

A high-angle, black and white photograph of a paved surface, likely a sidewalk or plaza, composed of rectangular stone tiles. Several long, dark shadows of people are cast across the tiles, suggesting a low sun position. The shadows are elongated and stretch towards the bottom of the frame. The overall mood is somber and contemplative.

RETRENCHMENT

**The Law and Practice
in Malaysia**

**Ashgar Ali Ali Mohamed
Farheen Baig Sardar Baig**

SWEET & MAXWELL ASIA

Retrenchment: The Law and Practice in Malaysia

Ashgar Ali Ali Mohamed

LLB (Hons); MCL (IIUM);
LLM (Hons) (University of Auckland);
PhD (Business Law) (University Putra Malaysia)
Associate Professor
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia
Advocate and Solicitor (Non-Practising)

Farheen Baig Sardar Baig

Diploma in Islamic Studies; LLB (Hons);
MCL; PhD (Law) (IIUM)
Associate Professor
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia
Advocate and Solicitor (Non-Practising)



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50544 KUALA LUMPUR

Telefon
Faks

(603) 261 96 900
603 266 11 980 (Tang. DiPena. Mahkamah) 603 266 64 018 (Pendaftaran)
603 266 22 046 (Pendaftaran A. Kewangan)
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603 266 21 041 (Mahkamah 11, 12, 13, 14, 22, 23, 24, 25, 26 & 27)
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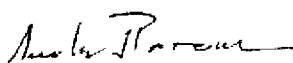
FOREWORD

I am honoured to be invited by Associate Professor Dr. Ashgar Ali and Associate Professor Dr Farheen Baig Sardar Baig, the authors to write the foreword.

The book *Retrenchment: The Law and Practice in Malaysia* is a significant contribution to the development of industrial law in Malaysia. The statutes, regulations and the *Code of Conduct For Industrial Harmony* on the procedures to be followed in the event of a retrenchment are highlighted. The decisions of the Industrial Court are analysed in a clear and organised manner.

Industrial law is dynamic as new patterns of employment emerge. The discussion on outsourcing highlights the conflicting interests of security of tenure for workmen and business efficiency for employers. The economic tensions as a result of outsourcing are topical. The authors have also made recommendations on how to deal with workmen who are retrenched. It is the obligation of the larger society to provide a safety net for workmen who are retrenched.

I congratulate the authors on the publication of the book.


Susila Sithamparam
President
Industrial Court
Malaysia

18 April 2012.

Preface

Retrenchment of workers on grounds of redundancy is a difficult area of labour law as it raises concerns about economic efficiency, industrial autonomy and social justice. It involves employees who have done no wrong, who in most cases are to be regarded as competent and loyal workers. However, if the employer carries on business in times of difficulty, keeps all his workers and incurs losses in the process, it may lead to his insolvency, bankruptcy or winding up. In such a situation, both the employer and the worker would be at a risk of losing their livelihood. Therefore, the other option is to sacrifice some workers, thereby saving the viability of the business and the employment of the remaining workers. The law therefore, cannot give an answer that can satisfy both the employer and the worker, for in such circumstances either party will have to face the bitter reality.

Be that as it may, an employer's unilateral declaration of redundancy must be justified on the basis of genuine commercial reasons and the decision to retrench workers must be done in good faith and carried out with fairness. The employer must consider various options to avert or minimise a reduction of workforce, such as a freeze on new hiring, reduction of working hours and overtime, elimination of temporary labour, transfer of workers, and consider providing alternative employment in the organisation including possible re-deployment, among others. The other options that can be considered by the employer include offering a voluntary separation scheme or retrenchment benefits to the affected workers, with the possibility of their future re-employment. The guidelines in the Code of Conduct for Industrial Harmony should be adhered to as they are consonant with the current ethos of corporate social responsibility whereby companies show compassion, concern and care towards their employees. Where the alleged dismissal without just cause or excuse is referred to the Industrial Court pursuant to s 20(3) of the Industrial Relations Act 1967, the court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether the employer's exercise of power was in fact bona fide. Generally, the court will not intervene with a management decision to retrench workers unless it is shown that the decision was capricious or without reason, or was mala fide, or was actuated by victimisation or unfair labour practice.

This book discusses, inter alia, the terminology commonly used, such as "redundancy", "retrenchment", "lay-off" and "termination"; factors

contributing to the creation of redundancies which eventually lead to retrenchment of workers; retrenchment procedures in the Code of Conduct for Industrial Harmony, such as early warning of impending retrenchment, exploring alternative employment within the organisation, and the "last in first out" (LIFO) principle; employer's prerogative to outsource its non-core business activity or business process; principles regulating voluntary separation schemes or mutual separation schemes; employer's obligation to pay retrenchment benefits and its taxability; and Pembangunan Sumber Manusia Berhad's training and development programmes. The other highlights of this book are a discussion of retrenchment from the Islamic perspective, the setting up of a retrenchment fund and a suggested mechanism for its effective implementation in Malaysia. This book also examines the principles and guidelines which a prudent employer must adhere to in order to ensure that a termination on grounds of redundancy is bona fide and in accordance with the established principles and procedures of industrial jurisprudence.

We would like to take the opportunity to extend our heartiest appreciation and thanks to Puan Susila Sithamparam, President of the Industrial Court of Malaysia, for her kindness and willingness to spend her invaluable time in preparing the Foreword to this book. Our gratitude further extends to the publisher, Sweet & Maxwell Asia, and in particular, Kevin Ooi, Joel Ng and Mohd Zakry Sa'ed, for taking a great deal of interest in the publication and for the support in finally getting this book published. It is our sincere wish and hope that this book will benefit the whole legal and non-legal working community such as judges, chairmen of the Industrial Court, legal practitioners, the Federation of Malaysian Manufacturers (FMM), the Malaysian Employers Federation (MEF), CUEPACS or Congress of Unions of Employees in the Public and Civil Services, the Malaysian Trade Union Congress (MTUC), human resource/industrial relations consultants, along with practitioners, academicians, students and others.

We alone are responsible for any shortcomings in this book and welcome any suggestion for improvements.

The law is stated as it stands on April 1, 2012.

Ashgar Ali Ali Mohamed

Ahmad Ibrahim Kulliyah of Laws (AIKOL)
International Islamic University Malaysia (IIUM)

Farheen Baig Sardar Baig

Ahmad Ibrahim Kulliyah of Laws (AIKOL)
International Islamic University Malaysia (IIUM)

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In the name of Allah, the Compassionate, the Merciful.

All praise is due to Almighty Allah *subhanahu wa Ta'ala* (SWT) alone, the exalted, the Lord of the universe. It is only through His blessing and guidance that we have been able to bring this book to completion. May Allah's peace and blessing be upon Prophet Muhammad (SAW), his family and his righteous companions.

The authors would like to express their deepest appreciation to the Research Management Centre, International Islamic University Malaysia (IIUM) for their financial support for this research project and further, for their support towards the publication of this work. Our heartiest thanks are due to Puan Susila Sithamparam, President of the Industrial Court of Malaysia, for spending her invaluable time in preparing the Foreword to this book. Our gratitude is further extended to the publisher, Sweet & Maxwell Asia, especially Kevin Ooi, Joel Ng and Mohd Zakry Sa'ed, for taking a great deal of interest in the publication and for the support in finally getting this book published.

Individually, Ashgar Ali Ali Mohamed extends his gratitude to the International Islamic University Malaysia for offering him sabbatical leave to complete this research. Farheen Baig Sardar Baig records her sincere appreciation and heartfelt thanks to the editors of the Shariah Law Reports (ShLR), LexisNexis (M) Sdn Bhd, for their kind permission in allowing her to reproduce part of her article entitled "Retrenchment from the Islamic Law Perspective: With Reference to the Obligation of an Islamic State Towards the Retrenched Worker" published in [2006] 2 ShLR 61. This research is also part of her revised thesis submitted in 2005 to the Ahmad Ibrahim Kulliyah of Laws, IIUM for obtaining her Doctor of Philosophy (PhD) degree.

Last but not least, special appreciation must be accorded to our two boys, the light of our lives, Muhammad Irfan Ashgar Ali and Muhammad Imran Ashgar Ali, for patiently sitting through their school holidays and weekends at home while we were struggling to keep up with the pressure and demands of accomplishing this arduous task.

Ashgar Ali Ali Mohamed
Farheen Baig Sardar Baig
April 20, 2012

About the Authors

Ashgar Ali Ali Mohamed graduated with a Bachelor of Law (LLB (Hons)) and Master of Comparative Laws (MCL) from the International Islamic University Malaysia (IIUM), Master of Laws (LLM (Hons)) from the University of Auckland, New Zealand and Doctor of Philosophy in Business Law (PhD) from the Graduate School of Management, University Putra Malaysia. He was admitted to the Malaysian Bar as an Advocate and Solicitor by the High Court of Malaya in 1992, and thereafter, he joined the Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM) as an academic staff. He is currently an Associate Professor at the said Kulliyah. He has authored several books on employment law, and has written numerous articles published in both local and international journals/reports. He has also presented papers at numerous conferences in the areas of employment law and civil litigation. His areas of interest include employment law, civil litigation and alternative dispute resolution.

Farheen Baig Sardar Baig is a graduate of the International Islamic University Malaysia (IIUM) with the following qualifications: Diploma in Islamic Studies; Bachelor of Law (LLB (Hons)); Master of Comparative Laws (MCL); and Doctor of Philosophy (PhD) in Law. She was admitted to the Malaysian Bar as an Advocate and Solicitor by the High Court of Malaya in 1996 and had been in practice for several years before joining the Ahmad Ibrahim Kulliyah of Laws, IIUM as an academic staff. She is currently an Associate Professor at the said Kulliyah and her areas of interest include employment law and tort law. She has co-authored several books on employment law and published numerous articles both in local and international journals/reports. She has also presented papers on the abovementioned areas at conferences.

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Retrenchment: An Introduction and an Overview

INTRODUCTION

It is on the solid basis of security of tenure of employment, which brings guaranteed regular income that a workman sustains himself, gets married, brings forth children, is able to give them education, purchase a house, a vehicle for transportation, looks after his dependants and his aged parents and looks forward to a secure retirement. Society will crumble, individuals driven to despair, a family's well being jeopardised, children's schooling interrupted and indebtedness encouraged when a workman does not enjoy security in the form of continuity and permanency of employment. Unless a workman is able to obtain immediate employment elsewhere, even though on less favourable terms or has recourse to savings, he would not be able to meet the exigencies of his monthly budgeting in respect of himself and his family, and schooling children if any: per W Satchithanandhan in *Innoprise Corporation Sdn Bhd, Sabah v Sukumaran Vanugopal, Sabah*.¹

The above excerpt highlights the importance of job security in the form of continuity in employment in an organisation up to the normal retirement age provided that the performance of the employee remains satisfactory and that there are no circumstances justifying the termination of the services. It is trite law that no employer can dismiss, or even contractually terminate the services of his employee, save and except with just cause and excuse. Unfortunately the very existence of retrenchment, however, denies a worker the job security which he expects. Losing one's job due to redundancy can be a distressing experience that inflicts severe economic hardship on the affected worker, which can sometimes shatter the life of the worker as it has both financial repercussions and psychological effects. The aggrieved worker would be deprived of his major source of income

1 [1993] 1 ILR 373 at 377.